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No. 89-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of THOMAS EUGENE CLARDY, deceased, and CLARDY REALTY, INC.,
Petitioners,

v.

MARTHA HOFFMAN SANDERS,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF GOLDEN RULE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In considering whether to grant the petition for certiorari in this case, the Court may be confronted with the assertion by respondent that Alabama and other States have responded adequately to this Court's suggestion that the States should have the opportunity in the first instance to address the characteristics of their respective punitive damage regimes that have, over the past decade, led to the imposition of increasingly frequent, larger and essentially unrestricted and unpredictable punitive damage awards. Amicus curiae will address the following question:

> Whether the enactment of so-called tort "reform" statutes by a number of States since 1986 should dissuade the Court from addressing the serious constitutional deficiencies in the punitive damage systems of most jurisdictions.

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BRIEF AMICUS CURIAE OF GOLDEN RULE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

This case concerns the power of the courts, generally through the medium of juries, to impose punitive fines in unpredictable amounts limited only by the passions that may be aroused in a particular case.

Golden Rule Insurance Company began almost a half century ago in the basement of a small town as a small family-owned insurance business. Although Golden Rule has grown because of its ability to meet

the needs of its policy-holders, it is continuously exposed to the threat of unlimited punitive damages in virtually all of the many States, including Alabama, in which it writes insurance. A massive punitive damage award would impose a particularly gross injury on a company the size of Golden Rule. Golden Rule has followed closely this Court's interest in punitive damages and has filed amicus curiae briefs on each of the three previous occasions the Court has seen fit to grant review of cases presenting constitutional objections to punitive damages.[1]

Golden Rule believes that it can provide the Court with a useful perspective on the question it addresses.[2]

STATEMENT OF THE CASE

This case presents the question left for another day in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989): Whether the Due Process Clause of the Fourteenth Amendment acts as a check on unrestrained jury discretion to award punitive damages in the absence of an express statutory limit. Such unconstrained jury discretion resulted in the $2,750,000 punitive damage award imposed against petitioners under an Alabama statute that authorizes the parent of a deceased minor

[1] *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986); *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

[2] Consent to the filing of this brief has been given by counsel of record for each of the parties; letters reflecting those consents have been sought and will be filed with the Clerk of the Court upon their receipt by Golden Rule.

to act as a private attorney general by bringing an action to punish the wrongdoer. *See* Ala. Code § 6-5-391 (1975). Alabama statutory law and common law place no limit on the amount of punitive damages that may be imposed against a defendant in a wrongful death action. Thus, the punitive damage award in this case is the product of an arbitrary system that typifies in many respects the punitive damage systems presently in place in most jurisdictions in the Nation. Therefore, petitioners' Due Process Clause challenge to the $2,750,000 punitive damage award raises an important issue that is worthy of this Court's review.

This case is a particularly appropriate vehicle for the Court's consideration of the due process challenge to unlimited jury discretion to award punitive damages. In June 1987, the Alabama legislature enacted a number of changes to the the State's punitive damage system which leave unresolved the fundamental defects in that system. The 1987 Alabama legislation, *inter alia*, placed a limit of $250,000 on punitive damage awards in some types of cases,[3] adopted a "clear and convincing" standard of proof,[4] and established that "[o]n appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."[5] These provisions, however, are made expressly inapplicable to wrongful death actions like the case at bar.[6] Moreover, the $250,000 limit on the size of pu-

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[3] Ala. Code § 6-11-21 (Supp. 1988).

[4] Ala. Code § 6-11-20 (Supp. 1988).

[5] Ala. Code § 6-11-24 (Supp. 1988). The legislation also attempts to define several of the types of conduct giving rise to punitive damage liability. *Id.*, § 6-11-20(b). *See infra*, pp. 15-16.

[6] Ala. Code § 6-11-29 (Supp. 1988).

nitive damage awards does not apply to other broad classes of cases involving (1) a pattern or practice of intentional conduct;[7] (2) conduct involving "actual malice"; or (3) libel, slander or defamation.[8] *See* Petition, at 14-15.

The Alabama legislature has therefore recently decided to leave entire classes of defendants exposed to unlimited monetary punishments based upon a subjective evaluation of whether a defendant's conduct constituted a "pattern or practice" or "actual malice." As amicus shall demonstrate below, the Alabama response is similar to the legislative reaction in most States to the burgeoning punitive damage phenomenon.

SUMMARY OF ARGUMENT

Defenders of the punitive damage systems in place in most jurisdictions in this country have attempted to discourage examination by this Court of the constitutional implications of those systems on the ground, *inter alia*, that the legislatures of many States are reforming the more capricious qualities of these systems. For example, in another case presently before the Court, a Nevada beneficiary of a $5,900,000 punitive windfall argues that Nevada's legislature and highest court have responded adequately to this Court's admonitions in cases such as *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988),

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[7] This Court has had experience with the ambiguities latent in permitting punishment for a "pattern" of proscribed activities. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989).

[8] Ala. Code § 6-11-21 (Supp. 1988).

that the States should themselves act to bring their punitive damage systems under control. *See* Br. of Resp. in Opp., at 18, in *Combined Insurance Co. of America* v. *Ainsworth*, No. 89-282, *pet. for cert. filed*, August 17, 1989. That litigant asserts that since 1986, twenty-one other States have "reformed" the laws respecting their punitive damage systems. *Id.*, n.14.

However, as even a cursory examination of recent state legislative activity in this area of the law reveals, the net effect of this "reform" is to entrench more firmly the very flaws that have been of greatest concern to this Court. Tort "reform" statutes, such as that enacted in Alabama in 1987, are so riddled with exceptions and uncertainty that they are virtually meaningless except as they provide legislative imprimaturs on punitive damage systems that continue to place unbridled power in juries to punish defendants whose views, status or actions may be unpopular in general or in a particular case. And what the legislatures may enact may also be repealed, as illustrated by the recent action of the Montana legislature in repealing its then newly enacted limit on punitive damage awards.

The cosmetology practiced by most of the state legislatures and courts does virtually nothing to address the underlying features of the punitive damage systems that daily threaten to undermine the stability of contracts and fundamental economic relations. This Court should not again postpone an examination of the constitutional defects in the punitive damage systems in Alabama and elsewhere because those defects have not been and are not likely to be cured by the States.

ARGUMENT

A. Introduction

The Court first suggested in 1986 that unlimited, standardless punitive damage systems raise "important" due process questions. *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Two years later in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), the Court declined to decide those questions, in part to avoid prematurely foreclosing "possibly more appropriate resolutions" of these serious issues. *Id.*, at 1651. The Court in *Bankers Life* acknowledged that state legislatures might choose to enact statutory limits and other meaningful controls on punitive damages. *Id.* & n.3.

However, despite the Court's expressions of concern over the lack of legislatively established standards governing the imposition of punitive damages, Alabama, like the vast majority of States, has failed to establish fixed standards that provide fair warning to defendants of the maximum punishment to which they might be subjected for particular misconduct. In most instances juries remain free to impose punitive damages "guided by little more than an admonition to do what they think is best." *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring). In short, juries continue to have "discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state." *Bankers Life*, 108 S. Ct., at 1655 (O'Connor, J., concurring in part).

Since 1986, at least twenty-five States have enacted legislation relating to punitive damages. Only three of those States, however, have placed limits on the

size of such awards in all cases. A few States, like Alabama, have established a maximum punitive fine for some types of cases (usually non-intentional tort cases), but have excluded from such maxima entire classes of cases in which juries frequently impose excessively large punitive damage awards. In these cases it remains that "[punitive] damages are the direct product of the ancient theory of unlimited jury discretion. . . ." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). Legislation directed more narrowly at other aspects of the punitive damage system has been similarly incomplete and nonresponsive to the due process problems posed by the capriciousness and destructive capacity of a system that allows juries broad latitude both as to whether there shall be a punishment and how much.

The concerns expressed in *Aetna, Bankers Life* and *Browning-Ferris* regarding the important constitutional implications of these systems have largely gone and continue to go unheeded by state legislatures. The need for this Court to intervene is therefore manifest.

B. Post-1986 Punitive Damage Legislation Has Generally Not Included Express Statutory Limits on the Size of Punitive Damage Awards

In most States that permitted the recovery of punitive damages as of 1983, the discretion of juries was not proscribed by legislatively established limits on the amount of punishment that could be imposed. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269-79, 298-99, 314 (1983). Recent state legislation has produced few explicit, fixed limits on this otherwise unlimited jury discretion. Defendants in the over-

whelming number of punitive damage cases remain unprotected from arbitrary, unlimited and excessive punishments.

1. Legislation Applicable to All Punitive Damage Cases

Since 1986, a Virginia $350,000 limit on punitive damage awards in any action "accruing on or after July 1, 1988," Va. Code Ann. § 8.01-38.1 (Supp. 1989), is the only state enactment to establish a fixed dollar amount limit on punitive damage awards in all cases.

Although both Colorado and Kansas recently enacted provisions that establish *post hoc* "limits" on the size of the award, these "limits" do not enable defendants to ascertain *in advance* the amount of punishment to which they might be subjected. The Colorado legislation limits punitive damages to the amount of the compensatory award (or three times that amount if the misconduct continued during the trial). Colo. Rev. Stat. § 13-21-102 (1987). But in Colorado, as in most States, juries have virtually unlimited discretion to determine the amount of compensatory damages to be awarded. *See, e.g., Smith* v. *Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984) ("The amount of actual damages is within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record.").

Similarly, the Kansas statute, Kan. Stat. Ann. § 60-3701(e) (Supp. 1988), prohibits the assessment of punitive damage awards in excess of the lesser of defendant's highest gross annual income during the five-year period preceding the misconduct, or $5,000,000. This statute paints with an extraordinarily broad brush, drawing no distinctions among the many types of conduct that might warrant punitive dam-

ages. Instead, it exposes persons to levels of punishment based upon their financial positions rather than upon the need to achieve adequate retribution and deterrence. Furthermore, if the court finds that the profitability of defendant's misconduct exceeds or will exceed that amount, it may impose punitive damages of 1 $^1/_2$ times the amount of defendant's profit. *Id.*, § 60-3701(f).[9]

2. Legislation Expressly Excluding Certain Types of Cases from Statutory Limits

The $250,000 ceiling on punitive damages enacted by Alabama does not apply to a wide array of cases—wrongful death cases, cases involving a pattern or practice of intentional conduct, cases involving "actual malice," and cases involving defamation, libel or slander. *See* Ala. Code § 6-11-21 & § 6-11-24 (Supp. 1988). In such cases, juries retain discretion to award punitive damages in any amount.

The limits established by Nevada Assembly Bill 307, which became effective on May 30, 1989, are similarly eviscerated by exceptions. That bill provides that punitive damages may not exceed three times the amount of compensatory damages[10] if the amount of

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[9] In 1986, New Hampshire statutorily prohibited the award of punitive damages in all actions "unless otherwise provided by statute." N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988). However, prior to their abolition, "punitive" damages in New Hampshire had been regarded as serving a compensatory, rather than punitive, function. *See* K. Redden, *Punitive Damages* § 5.2(A)(29) (1980).

[10] As in Colorado, Nevada juries have extremely broad discretion to determine the amount of compensatory damages. *See, e.g., Miller* v. *Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls

compensatory damages is $100,000 or more, or $300,000 if the compensatory damage award is less than $100,000. These limits are expressly inapplicable to two types of tort cases in which punitive damage awards are assessed with perhaps the greatest frequency and in the highest amounts—actions brought against a "manufacturer, distributor or seller of a defective product" and an "insurer who acts in bad faith regarding its obligations to provide insurance coverage." Moreover, like Alabama, Nevada chose to exempt punitive damage awards in defamation actions. Environmental or other "toxic tort" cases are likewise excluded.

Similarly, the Georgia legislature in 1987 passed legislation that fixes a $250,000 limit on the size of punitive damage awards only in some non-intentional tort cases. Ga. Code Ann. § 51-12-5.1(g) (Supp. 1989). But this section expressly codified the common law rule that "[i]n a tort case in which the cause of action arises from *product liability, there shall be no limitation* regarding the *amount* which may be awarded as punitive damages." Ga. Code Ann. § 51-12-5.1(e)(1) (Supp. 1989) (emphasis added).[11] That legislation also exempts cases in which the defendant acted "with

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peculiarly within the province of the trier of fact, in this case, a jury. . . . The core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not.").

[11] This provision allows recovery of only one punitive damage award in the courts of Georgia against a product liability defendant "for any act or omission" even if such conduct gave rise to multiple causes of action. *Id. See also* Mo. Ann. Stat. § 510.263(4) (Vernon Supp. 1989) (allowing defendant to seek "credit" for previously paid awards arising out of same conduct). Nonetheless, the amount of that single award is unlimited.

the specific intent to cause harm. . . . " Ga. Code Ann § 51-12-5.1(f) (Supp. 1989).

Texas preserved the rule of unlimited punitive damages in its 1987 punitive damage legislation in cases involving intentional misconduct. Section 41.007 of the Texas Civil Practice and Remedies Code limits punitive damages to four times the compensatory award, or $200,000, whichever is greater *only* in cases in which gross negligence is the predicate for the punitive damage award. Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1989). In cases in which liability is based on an intentional tort, or "malice,"[12] punitive damages can be awarded in any amount. *Id.*, § 41.008.[13]

3. Legislation Establishing Limits That Can be Avoided by a Showing of Clear and Convincing Evidence

As part of its general "tort reform" legislation, the Florida legislature in 1986 enacted Fla. Stat. Ann. § 768.73 (West Supp. 1989), which, *inter alia*, created

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[12] Tex. Civ. Prac. & Rem. Code Ann. § 41.001 broadly defines the term "malice" to include specific intent to cause injury as well as knowingly dangerous "flagrant disregard for the rights of others. . . . "

[13] A number of States have prohibited altogether the award of punitive damages in certain kinds of cases. *See, e.g.*, Ill. Ann. Stat. ch. 110, ¶ 2-1115 (Smith-Hurd Supp. 1989) (medical malpractice); Or. Rev. Stat. § 18.550 (1987) (actions against "health practitioners"). In addition, several have established a defense to punitive damages in product liability cases if the drug manufacturer complied with requirements of the Food and Drug Administration. *See, e.g*, Tex. Civ. Prac. & Rem. Code Ann. § 81.003 (Vernon Supp. 1989); Or. Rev. Stat. § 30.927 (1987). Connecticut has limited the amount of punitive damages to twice the compensatory damage award in product liability cases. Conn. Gen. Stat. § 52-240(b) (Supp. 1989).

a rebuttable presumption that an award of punitive damages that exceeds three times the amount of the compensatory damage award is "excessive," but did not establish a maximum limit on the size of punitive damage awards. Fla. Stat. Ann. § 768.73(1)(a)-(b) (West Supp. 1989). The jury is not informed of this presumption and the jury's discretion to impose punitive damages in the first instance is therefore not limited or constrained in any way. However, if the jury returns a punitive damage award that exceeds three times the amount of the compensatory damage award, the amount awarded may stand if "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." *Id.*, § 768.73(1)(b). This new legislation thus merely shifts and increases the burden of proof on the issue of excessiveness.

Title 23, § 9 (West 1987) of the Oklahoma Statutes Annotated provides that punitive damages may not exceed "the amount of actual damages awarded." However, this "percentage limitation on such damages . . . shall not apply" if "there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed. . . . " Thus, upon a "clear and convincing" showing plaintiffs in Oklahoma may seek and juries may impose punitive damages in virtually any amount.

4. Legislation Removing Express Statutory Limits

In 1987, the State of Montana amended Mont. Code Ann. § 27-1-221 (1987), and reinstated the rule of unlimited punitive damages in all cases, which it had

restricted only two years before to $25,000 or 1% of the defendant's net worth in cases not involving "actual fraud or actual malice."

5. Legislation Requiring That a Portion of the Award Be Paid to the State

Implicitly recognizing that punitive damages are imposed by governments for governmental purposes and are intended to redress public wrongs rather than private injuries, a number of recently enacted statutes require that a portion of punitive damage awards be paid to the State. *Compare Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated."). These statutes, while reducing the amount of a particular private plaintiff's windfall recovery of punitive damages, do nothing at all to constrain the discretion of juries or courts to impose punitive damages.

At least seven States, Colorado, Florida, Georgia, Iowa, Missouri, Oregon, and Utah, now require that some portion of punitive damage awards (usually after deducting costs and attorneys' fees) be paid into a state fund. For example, the Florida statute requires that 60% of each punitive damage award imposed in a personal injury or wrongful death case be paid to the Public Medical Assistance Trust Fund and, in all other cases, to the State's General Reserve Fund. Fla. Stat. Ann. § 768.73(2) (West Supp. 1989). Similarly, in Georgia 75% of any punitive damage award must "be paid into the treasury of the state. . . . " Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1989).[14]

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[14] *See also* Colo. Rev. Stat. § 13-21-102(4) (1987) (one-third of

Although these States have chosen to redirect a portion of the substantial sums awarded to punitive damage plaintiffs, these "reforms" exacerbate rather than resolve the troublesome constitutional problems raised by punitive damages. *See, e.g., Browning-Ferris*, 109 S. Ct., at 2914, 2920 n.21 (leaving open the question whether the Excessive Fines Clause of the Eighth Amendment is implicated if the Government shares in an award of damages exacted for purposes of punishment); *id.*, at 2932-33 (O'Connor, J., concurring in part and dissenting in part) ("by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity") (citing Fla. Stat. § 768.73(2)(b)).

C. The Punitive Damage Systems in Virtually All Jurisdictions Remain Fundamentally Unfair and Violative of the Due Process Clause

Procedural "reforms" in punitive damage systems have also made only inconsequential, minor inroads into the traditional province of juries to award pu-

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all reasonable punitive damages collected "shall be paid to the state general fund"); Iowa Code Ann. § 668A.1(2)(b) (West 1987) (if defendant's conduct was not specifically directed at the plaintiff, 75% of the punitive damage award goes to state civil reparations trust fund); Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of any final judgment awarding punitive damages deemed "rendered in favor of the state of Missouri"); Or. Rev. Stat. § 18.540 (1987) (50% of punitive damage award "shall be paid to the Criminal Injuries Compensation Account"); Utah Code Ann. § 78-18-1(3) (Supp. 1989) (50% of any amount of punitive damages exceeding $20,000 must be "remitted to the state treasurer for deposit into the General Fund").

nitive damages on an *ad hoc* and subjective basis, and leave completely unresolved the due process issues presented in *Aetna, Bankers Life* and *Browning-Ferris*. For example, several States have altered the rules of pleading with respect to punitive damages. Florida, Idaho, Illinois, Minnesota and North Dakota prohibit the pleading of punitive damages in an original complaint and generally require some sort of showing that there is a reasonable likelihood that the plaintiff will be able to establish a claim for punitive damages.[15] However salutary this change may be, it does not ameliorate the major constitutional problems presented by massive fines that are subjectively administered in unlimited amounts.

The "lack of sufficient standards governing punitive damage awards in Alabama" mentioned in *Aetna* as presenting an important due process issue has not been resolved in Alabama or anywhere else. Only six States—Alabama, Kentucky, Montana, California, New Jersey and Texas—have taken *any* legislative action to limit or attempt to define more precisely the conduct which may give rise to punitive damage liability. *See* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 21.22 (1985) (section added March 1989). These attempts to define vague, elastic terms such as "malice," "fraud," "recklessness" and "gross negligence" have resulted in standards that remain far from precise. For example, the California legis-

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[15] Fla. Stat. Ann. § 768.72 (West Supp. 1989); Idaho Code § 6-1604(2) (Supp. 1989); Ill. Ann. Stat. ch. 110, ¶ 2-604.1 (Smith-Hurd Supp. 1989); Minn. Stat. Ann. § 549.191 (West 1988); N.D. Cent. Code § 32-03-7 (Supp. 1989). Georgia now requires a specific prayer for punitive damages in the original complaint. Ga. Code Ann. § 51-12-5.1(d)(1) (Supp. 1989).

lature in 1987 amended its statutory standards to require that conduct be "despicable" as well as "malicious" and "oppressive," to support punitive damages. Cal. Civ. Code § 3294(c) (Deering Supp. 1989). The 1987 Alabama legislation redefined the term "malice" to include, *inter alia*, the "intentional doing of a wrongful act without just cause or excuse . . . [u]nder such circumstances that the law will imply an evil intent," and "fraud" as an intentional misrepresentation "which was gross, oppressive or malicious." Ala. Code § 6-11-20(b) (Supp. 1988). But these statutes do little more than add new and highly subjective terms to already vague and subjective standards.

Although "punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting). Since 1986, no State has legislatively adopted a standard of proof requiring that liability for punitive damages be established "beyond a reasonable doubt." Moreover, although a number of States recently have increased the burden of proof in at least some punitive damage cases from "preponderance of the evidence" to "clear and convincing evidence,"[16] two States, Idaho and New Jersey, have expressly codified the preponderance of the evidence standard in punitive damage cases.[17]

Recent punitive damage legislation in several States[18] requires some form of bifurcated trial in

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[16] *See* J. Ghiardi & J. Kircher, *supra*, § 21.13 (listing ten states); *see also* Nevada Assembly Bill 307 (eff. May 30, 1989).

[17] J. Ghiardi & J. Kircher, *supra*, § 21.13.

[18] *See, e.g.*, Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Nevada

which either the claim for compensatory damages is bifurcated from the punitive damage claim or the jury's determination of punitive damage liability precedes its determination of the amount of the award. However, simply dividing the jury's assigned tasks into separate phases leaves with the jury the power to punish with unbridled authority. It appears that only three States, Connecticut, Kansas and Ohio have placed statutory responsibility for setting the amount of the award solely in the hands of the trial judge once the jury determines liability,[19] and the Connecticut provision is only applicable to product liability cases.

CONCLUSION

In the context of a system of punishment in which "responsible officials had deliberated and then agreed" as to "a range of penalties," *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring), the limited reforms of state punitive damage law documented above might be regarded as noteworthy, if inadequate, efforts to restrain the passions of juries as they perform the function of selecting the appropriate punishment to impose on defendants within such a "range of penalties." In the absence of such considered legislative judgments, however, these so-called "re-

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Assembly Bill 307; Mo. Ann. Stat. § 510.263 (Vernon Supp. 1989); Mont. Code Ann. § 27-1-221 (1987); N.J. Stat. Ann. § 2A:58C-5 (West 1987); Ohio Rev. Code Ann. § 2315.21 (Anderson 1988).

[19] *See* Conn. Gen. Stat. § 52-240(b) (Supp. 1989); Kan. Stat. Ann. § 60-3701(a) (Supp. 1988); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1988). *Compare ABA Standards for Criminal Justice*, Standard 18-1.1 *Commentary* (2d ed. 1980) (rejecting use of a jury in imposing a punishment in the criminal context).

forms" merely demonstrate that state legislatures are not prepared to address and resolve the much more basic "vagueness and procedural due process problems," *id.*, at 2924 (O'Connor, J., concurring in part), posed by the open-ended, common law punitive damage systems that continue to flourish across the Nation.

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